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SUPREME COURT
STATE OF WASHINGTON
2007 JAN 17 P 2:54

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint
Petition of

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No. 77973-2

STATE'S RESPONSE TO MOTION
FOR DISCRETIONARY REVIEW

COREY BEITO,
Petitioner.

By ruling dated November 29, 2006, this Court requested that the State file a response to the pending Motion for Discretionary Review. For the reasons stated below, the State believes that the motion for discretionary review should be denied.

A. FACTS RELEVANT TO MOTION.

Corey Beito was charged by information with aggravated murder in the first degree. PRP Appendix A.¹ The Certification for Determination of Probable Cause alleged that Beito strangled 14-year-old Jessica Seim to death. PRP Appendix A. After killing her, he stuffed her body in a garbage can and locked it into his backyard tool shed. PRP Appendix A. In a taped statement to the police, Beito admitted to strangling the victim, who he referred to as "just a baby"

¹ The relevant documents were appended to the PRP. These will be cited in this answer as "PRP

after having what he claimed was consensual sex with her. PRP Appendix A. Evidence of sexual assault, in particular a vaginal abrasion, was found during the autopsy. PRP Appendix A.

Beito entered a plea of guilty to the charge of murder in the first degree. PRP Appendix B. In the plea form, Beito admitted to causing the death of the victim, and stated his wish to plead guilty to the reduced charge because of the substantial likelihood that a jury would find the murder to be premeditated. PRP Appendix B. In the plea, Beito agreed that "the Court may consider the certificate of probable cause as well as the terms of Appendix C to form a basis for my plea and my sentencing." PRP Appendix B (emphasis added).

The "Plea Agreement" attached to the Statement of Defendant On Plea of Guilty states, "[i]n accordance with RCW 9.94A.370 the parties have stipulated that the court, in sentencing, may consider as real and material facts information as follows: as set forth in the attached Appendix C." PRP Appendix B.

"Appendix C to Plea Agreement Re: Real Facts", signed by the prosecutor, defense counsel and Beito, states that "as part of the plea agreement, Real and Material facts establishing elements of a Rape First and Second Degree, and Rape of a Child in the Third Degree to be considered at sentencing are specifically stipulated to." PRP Appendix B (emphasis added). Pursuant to that document, the defendant acknowledged "[t]hat the crime of Rape of a Child

Appendix ____.

Third Degree was committed," but disputed that the crimes of first or second degree rape was committed. PRP Appendix B. The parties stipulated that the court could consider Beito's statement to the police, the written statements of Michael Corbell, Mark Coffey and Nick Gaffe, the autopsy report and photos. PRP Appendix B. No testimony was presented at the sentencing hearing. PRP Appendix D.

At the initial sentencing, the court imposed an exceptional sentence of 504 months, as recommended by the State and the Department of Corrections. PRP Appendix D. Counsel for Beito recommended a standard range sentence. PRP Appendix D. Beito appealed the sentence. PRP Appendix E. The Court of Appeals reversed the exceptional sentence and remanded for a determination of whether the child rape was "so closely connected to the murder as to be considered 'part and parcel' of the same crime." PRP Appendix E, at 6.

At the second sentencing on remand, the court again imposed an exceptional sentence of 504 months after finding that "the rape was a motive for, and factually connected to, the murder". PRP Appendix F. At this sentencing, counsel for Beito again recommended a standard range sentence. PRP Appendix F.

Beito again appealed, arguing that his offender score had been incorrectly calculated due to the erroneous inclusion of two juvenile convictions that had "washed-out." PRP Appendix G. The State conceded that the offender score

was erroneously calculated, and the sentence was reversed and remanded.

PRP Appendix G.

At the third sentencing, the court again imposed an exceptional sentence of 504 months. PRP Appendix H. The sole basis for the exceptional sentence was the fact that Beito committed the crime of rape of a child in the third degree which was closely connected to the murder. PRP Appendix H. This sentence was appealed. In an unpublished decision the Court of Appeals affirmed the sentence, rejecting Beito's claims that the court failed to follow the proper procedure in imposing the sentence and that the sentence violated due process by being vindictive. PRP Appendix I. Beito's petition for review was denied on September 8, 2004. PRP Appendix J.²

Beito subsequently filed this personal restraint petition, alleging that imposition of an exceptional sentence based on judicial fact-finding violated the rule set forth in Blakely v. Washington, 524 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The Court of Appeals dismissed the petition.

² Thus, Beito's case was not final for purposes of retroactivity analysis when the Supreme Court issued its Blakely decision in June of 2004. See In re St. Pierre, 118 Wn.2d 321, 327, 823 P.2d 492 (1992).

B. ARGUMENT.

PETITIONER HAS FAILED TO ESTABLISH THAT THE CONSTITUTIONAL ERROR THAT OCCURRED IN THIS CASE RESULTED IN ACTUAL AND SUBSTANTIAL PREJUDICE.

In State v. Sulieman, __ Wn.2d __ (slip op. 76807-2, filed November 15, 2006), the defendant pled guilty to vehicular assault and stipulated to the facts set forth in the certification for determination of probable cause. However, Sulieman did not agree that the stipulated facts were a sufficient basis for an exceptional sentence. The trial court imposed an exceptional sentence based in part upon a finding of particular victim vulnerability. This Court concluded that the trial court's finding violated the rule set forth in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In order for a judge to make a determination of victim vulnerability, the defendant must stipulate that the record supports a determination of particular vulnerability. Slip opinion, at 12. Otherwise, the court is making a factual determination that must be made by a jury beyond a reasonable doubt. Id.

Upon finding that the sentencing procedure in Sulieman contained a Blakely error, this Court remanded for a determination of whether the error was harmless, pursuant to Washington v. Recuenco, __ U.S. __, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

As in Sulieman, Beito pled guilty to the crime charged and stipulated to

the facts set forth in the certification for determination of probable cause. He also explicitly admitted that he had committed the crime of rape in the third degree. However, Beito did not stipulate that the rape was closely connected to the murder. This finding was made by the trial court at the second sentencing. Like Suliman, the court's finding of that the rape and the murder were closely connected without an explicit stipulation to that fact violated Blakely.

In dismissing Beito's petition, the Court of Appeals concluded that Beito could not challenge imposition of an exceptional sentence without seeking to withdraw his plea, relying on State v. Hagar, 126 Wn. App. 320, 105 P.3d 65 (2005), reversed, ___ Wn.2d ___, 144 P.3d 298 (2006). This Court reversed Hagar, and held that a defendant who pleads guilty with the understanding that the State will seek an exceptional sentence may challenge the imposition of an exceptional sentence pursuant to Blakely without seeking to withdraw the plea. Hagar, 144 P.3d at 300.

Thus, in light of this Court's recent decisions in Suliman and Hagar, the trial court's fact-finding in this case violated the rule set forth in Blakely and Beito may challenge the imposition of the exceptional sentence. The question for this Court is now whether the Blakely error was prejudicial. In a personal restraint petition, the petitioner bears the burden of showing that a constitutional error resulted in actual and substantial prejudice. State v. Brune, 45 Wn. App. 354, 363, 725 P.3d 454 (1986). In the present case, Beito must show actual

and substantial prejudice by establishing a reasonable possibility that a jury would not have made the finding that the trial court improperly made: that the rape was "so closely connected to the murder as to be considered 'part and parcel' of the same crime." See In re Sims, 118 Wn. App. 471, 476-77, 73 P.3d 398 (2003). Significantly, Beito did not challenge the trial court's finding on direct appeal. See PRP Appendix G.

Beito has failed to establish a reasonable probability that a jury would not have found Beito's admitted rape of the victim was not closely connected with the murder. Beito has failed to provide the appellate courts with any of the evidence to which Beito stipulated and on which the sentencing court relied in finding that the rape was closely related to the murder. As noted above, the parties stipulated that the court could consider Beito's statement to the police, the written statements of Michael Corbell, Mark Coffey and Nick Gaffe, the autopsy report and photos. PRP Appendix B. In order to make a determination as to whether there is a reasonable probability that a jury would not have found a connection between the rape and murder based on this evidence, this Court would have to review all the materials that were before the trial court. Beito has provided none of these materials. As such, he has failed to meet his burden of establishing actual and substantial prejudice resulting from the Blakely error.

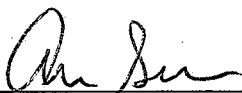
C. CONCLUSION.

Beito has failed to establish constitutional error that resulted in actual and substantial prejudice. This personal restraint petition was properly dismissed. The motion for discretionary review should be denied. In the alternative, this case should be remanded to the Court of Appeals to make a determination as to whether Beito can establish actual and substantial prejudice.

DATED this 14 day of January, 2006.

Respectfully submitted,

NORM MALENG
King County Prosecuting Attorney

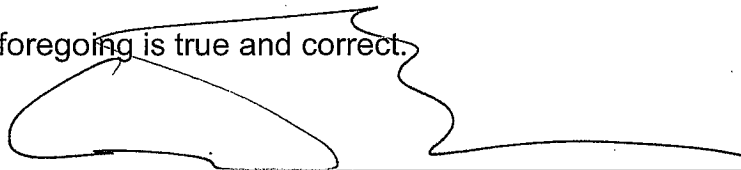
by 
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CERTIFICATION OF SERVICE

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Gregory Link, Washington Appellate Project, at the following address: 1511 Third Avenue, Suite 701, Seattle, WA 98101, attorneys for the petitioner, containing a copy of the State's Response to Motion for Discretionary Review in In re Corey Beito, 77973-2, in the Supreme Court of the State of Washington.

I certify under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

Date

1-16-2007